

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill does not appear to expand individual freedom because it limits an individual's ability to recover damages for the negligent acts of professional firms that contract with the Department of Transportation for construction contract administration.

B. EFFECT OF PROPOSED CHANGES:

Construction Contract Administration: The standard practice in the design and construction of roads and bridges is generally as follows: the Department of Transportation (DOT) contracts with design engineers in accordance with applicable codes and DOT specifications. The design engineer develops the plans and specifications and has control over interpretation of the plans and specifications. The contractor has control of the construction site, site personnel, and traffic management. During the construction period, DOT provides employees to observe and report on the contractor's activities. Typically, an engineering firm provides these services (known as construction engineering and inspection or 'CEI') pursuant to contract. The CEI engineer has no control over the design engineer, the contractor, or the contractor's means or methods of construction or traffic maintenance; it is the duty of the CEI engineer, by contract, to observe and report the contractor's activities and notify the DOT of compliance or non-compliance with all contractual requirements.¹ It is reported that CEI engineers are named in negligence suits as third party defendants when traffic accidents occur at road construction sites.²

Proposed changes: The bill limits liability for professional firms that contract with DOT for construction engineering and inspection, in accordance with the statutory waiver of sovereign immunity.

Immunity: Currently, governmental agencies are immune from liability, and not required to pay any claim which exceeds \$100,000 per person or \$200,000 per incident.³ Corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities are defined as 'governmental agencies' for purposes of the waiver of sovereign immunity and the limits on liability.⁴ Agents of the state and its subdivisions shall not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his or her employment or function, unless such officer, employee or agent acted in bad faith or with malicious purpose of in a manner exhibiting wanton and willful disregard of human rights, safety, or property.⁵

¹ Conversation with lobbyist for the Florida Association of the American Institute of Architects on February 28, 2003.

² See *Agner v. APAC-Florida, Inc.*, 821 So.2d 336 (Fla. 1st DCA 2002) (the court held that the issue of whether the engineering company was a state agency with sovereign immunity was not ripe for adjudication on motion to dismiss.)

³ See Article 10, Section 13 of the State Constitution (the state may waive its immunity through an enactment of general law); and s. 768.28(5), F.S., (state and local government entities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, subject to the \$100,000/\$200,000 limitation on liability.)

⁴ See s. 768.28(2), F.S.

⁵ See s. 768.28(9)(a), F.S.

Various bodies have been afforded agency status for the purposes of sovereign immunity: health care providers who provide services pursuant to the "Access to Health Care Act";⁶ any member of the Florida Health Services Corporation who provides uncompensated care to medically indigent persons referred by the Department of Health;⁷ public defenders;⁸ health care providers or vendors that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates;⁹ operators, dispatchers, and providers of security for rail services who perform services under contract with and on behalf of the Tri-County Rail Commuter Rail Authority or the Department of Transportation;¹⁰ and providers or vendors that have contractually agreed to act on behalf of the state as agents of the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders.¹¹

The courts have enumerated several factors required to establish an agency relationship: 1) acknowledgment by the principal that the agent will act for him; 2) the agent's acceptance of the undertaking; and 3) control by the principal over the actions of the agent.¹² Recently, the Florida Supreme Court has held that immunity should be granted to physician consultants who contract with the (then) Department of Health and Rehabilitative Services, Division of Children's Medical Services.¹³ In two cases, the Fourth District Court of Appeals has reversed the trial court's finding that an agency relationship existed by contract, thus entitling the private provider to limited liability pursuant to the waiver of sovereign immunity.¹⁴ Should the Court find that immunity has been provided absent a true agency relationship, access to court issues might be raised (see Constitutional Issues).

Proposed Changes: This bill adds professional firms that have contractually agreed to provide construction contract administration and related services for the Department of Transportation to the providers that are statutorily considered 'agents' for the purposes of the limitation of liability pursuant to the state's waiver of sovereign immunity. Such contract must provide for the indemnification of the state for any liability incurred by the department as a result of the agent's actions. Proponents of the bill claim that the bill is designed to afford limited liability to persons who perform duties identical to those performed by the Department.

C. SECTION DIRECTORY:

Section 1 amends s. 768.28(10), F.S., to add subsection (e) which provides that professional firms that have contractually agreed with the DOT for construction contract administration are agents of the state with respect to sovereign immunity.

⁶ See ss.766.1115 and 768.28(9)(b)2., F.S.

⁷ See ss. 381.0302 and 768.28(9)(b)2., F.S.

⁸ See s. 768.28(9)(b)2., F.S.

⁹ See s. 768.28(10)(a), F.S.

¹⁰ See s. 768.28(10)(d), F.S.

¹¹ See s. 768.28(11)(a), F.S.

¹² See *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

¹³ See *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997) (The Court found that the following factors evidenced an agency relationship between the physicians and Children's Medical Services (CMS): 1) CMS required the physicians to abide by policies and rules in the HRS and CMS manuals; 2) all physician services rendered and paid for by CMS had to first be authorized by the CMS medical director; and 3) HRS policy made CMS responsible for supervising all personnel and medical care for CMS patients. Note also that there is a claim bill currently pending regarding Minouche Noel, the child injured in the Stoll v. Noel case. See HB 183.)

¹⁴ See *Theodore v. Graham*, 733 So.2d 538 (4th DCA 1999) (the court held that the department's provisions gave the private director, not the department, great control over the program and patient treatment, and that the director's contract specified that she would be liable for negligent acts) and *Robinson v. Linzer*, 758 So.2d 1163 (Fla. 4th DCA 2000) (in spite of contract language that specified the agency relationship, government control over the method and manner of services, and immunity, the court reversed the trial court's finding that a physician was a hospital agent because the private agency had control of hiring and paying physicians, and was responsible for the day-to-day physician supervision.)

Section 2 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is anticipated that construction engineering and inspection firms would pay lower professional liability insurance premiums.¹⁵

D. FISCAL COMMENTS:

Extending sovereign immunity entitles the new agents to sovereign immunity, and also to liability coverage from the State Risk Management Trust Fund. This means that the Risk Management Trust Fund will pay damages up to the limits of sovereign immunity, and for defense legal fees and costs, as well as the cost of enforcing the indemnification clause. In addition, collection of any judgment or settlement agreement against a new agent, in excess of the sovereign immunity limits, would have to be addressed through the claim bill process.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require cities or counties to spend funds or take an action requiring the expenditure of funds.

2. Other:

¹⁵ See Besler, Chris, "Florida Highway Engineering Services: The Fast Lane to Liability?", CNA/Schinnerer Risk Management Program, 2002. The study was conducted by Victor O. Schinnerer & Company, the managing underwriter for the National Society of Professional Engineers professional liability insurance, which found that the frequency and severity of CEI-related professional liability claims in Florida far exceeded that of other states.

Access to Courts: The Florida Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.¹⁶ Where citizens have enjoyed a historical right of access to the courts, the Legislature may only eliminate a judicial remedy under two circumstances: 1) a valid public purpose coupled with a reasonable alternative; or 2) overriding public necessity.¹⁷ In the event that a valid agency relationship was not found to exist between professional firms providing construction contract administration and the Department of Transportation, the access to courts provision would be the likely constitutional challenge.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill sponsor has filed an amendment which provides consistency with other similar subsections of 768.28, F.S. Specifically, clarifying that this subsection is not intended to provide agency status for the purposes of the workers' compensation statutes; and mirroring the language of ss. 768.28(10) and (11), F.S.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

¹⁶ See Article 1, Section 21 of the State Constitution.

¹⁷ See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).